APPENDIX A

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT

JANUARY TERM, A.D. 1966

MALCOLM ROBERTS,
Appellant,

vs. CASE No. 65-505

THE STATE OF FLORIDA
Appellee.

Opinion filed June 28, 1966.

(Remainder of caption omitted)

The appellant, Malcolm Roberts, appeals a judgment and sentence thereon entered in the Criminal Court of Record for Dade County, Florida. He was informed against, tried, adjudged guilty and sentenced on two counts. The first count was upon a charge of conspiracy to commit grand larceny; the second count was for grand larceny. This appeal is a companion to the appeal of Louis Nash, Case No. 65-506, opinion filed this date. For the sake of brevity, we will not repeat the outline of the evidence set forth in that opinion. The appellant, Roberts, has presented five points for reversal.

Appellant's first point is:

"WHETHER THE TRIAL JUDGE ERRED IN FAILING TO GRANT APPELLANT, MAL-

COLM ROBERTS, A NEW TRIAL WHERE HIS CONVICTION WAS BASED, AT LEAST IN PART, ON THE CONTENTS OF A PRE-TRIAL STATEMENT, ADMITTED OVER OBJECTION, AND AS TO WHICH UNREBUTTED EVIDENCE PROVES WAS OBTAINED BY THREAT OF PHYSICAL HARM?"

The testimony of Roberts as to threats made in order to induce him to confess is as follows:

"Q. Did you discuss the case with them at that time?
A. Very little. Detective Rein took me around the corner into another room. He told me to remove my glasses.

Q. Mr. Rein did?
A. Detective Rein, that's right.

Q. Go ahead.
A. And he told me he was going to put me through the wall unless I answered some questions on this case.

Q. Did he? Did he hit you?
A. I took my glasses off.

Q. Go ahead.
A. And he moved right up to me.

Q. Did you answer any questions?
A. Did I answer any questions at that time?

Q. Yes.
A. No, sir.

Q. Even though the threatened to put you through the wall?
A. That's right.

Q. Who else was present when he threatened to put you through the wall?
A. Detective Rein took me out of the room that I was originally in with Captain Sandstrom and Detective Kegan, and took me around a corner to an isolated room.

* * *

Q. Now, did this occur, this threat by Detective Rein to send you through the wall, before or after you made a statement?
A. Before."

The State does not contend that this testimony is directly refuted in the record. However, it is urged that there was sufficient evidence before the Court upon which it could be found that the confession was freely and voluntarily given.

We hold that under the circumstances of this case the testimony above quoted was not sufficient to require, as a matter of law, a finding by the trial judge that the subsequently given confession was involuntary.

Appellant was taken into custody at about 4:00 P.M.; the statement was given at 5:35 P.M. on the same day. He was informed of the specific charge against him, and he was advised that any statement would be used against him. He was further advised that he should get a lawyer and a

bondsman. In fact, one of the officers called in appellant's behalf to find out what the amount of the bond would be.

The alleged threat was not accompanied by physical violence. The appellant showed every evidence of being an intelligent and well-informed person. The statement was given in a room in which there were several persons, and the appellant does not state that he was ever in fear, either at the time of the alleged threat or at the time of the statement. See Frazier v. State, Fla.1958, 107 So.2d 16. Cf., Harrison v. State, 152 Fla.86, 12 So.2d 307 (1942).

Appellant's points III and IV are directed to the sufficency of the evidence. The appellant and the State are in substantial agreement upon the facts shown by the record. Appellant's confession does not establish that he committed the crime of grand larceny, but it is sufficient, when taken with other facts in the record, to support his conviction of conspiracy to commit grand larceny. The confession establishes that he: (1) Conveyed messages between two persons concerning a "business deal" which he suspected was illegal; (2) received $300 for delivering a bag containing $1,000. In addition, two witnesses testified as to appellant's participation in the scheme; their testimony in this regard is that Roberts made several telephone calls to Rosen, one of the active participants in the crime, and that Roberts received $300.00 from him.

There is no doubt from this record that a conspiracy to commit grand larceny existed, and this conclusion may be reached without reference to the confessions of appellant's co-conspirators. There is sufficient evidence to connect Roberts with the conspiracy. The appellant was cognizant of a criminal intent, and by his continued partici-

pation he became criminally liable. See Pine v. U.S., 135 F.2d 353 (5th Cir.1943); 15 C.J.S. Conspiracy § 39. Cf. Meyers v. State, 43 Fla. 500, 31 So.275 (1901). We find the evidence sufficient to support the conclusion of the jury that appellant's actions were inconsistent with any reasonable hypothesis of innocence. Cf. State v. Trafficante, Fla. App.1961, 136 So.2d 264.

Upon the other hand we do not find the evidence sufficient to convict this appellant of grand larceny. The conviction upon the grand larceny count must be reversed upon authority of the rule in Ricard v. State, Fla.App.1966, 181 So.2d 677.

The last point to be considered is appellant's contention that the court erred in permitting the jury to take informations into the jury room without first deleting the names of other defendants who were not being tried. It is proper for the judge to permit the jury to take the information to the jury room. See Hall v. State, 119 Fla. 38, 160 So. 511 (1935); Fla.Stat.1963, § 919.04; annot. 120 A.L.R. 463. No case has been cited which creates an exception when other defendants, not being tried, are included in the indictment or information. In addition, the appellant fails to show how he was in any way prejudiced by the action of the trial judge. See Lamb v. State, 90 Fla. 844, 107 So. 530 (1925).

The judgment and sentence of the appellant Malcolm Roberts for the crime of conspiracy to commit grand larceny is affirmed. The judgment and sentence of appellant Malcolm Roberts for the crime of grand larceny is reversed and he is discharged therefrom.

Affirmed in part and reversed in part.

APPENDIX B

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
THIRD DISTRICT
NO. 65-505

PETITION FOR REHEARING

(Dated July 13, 1966)

Appellant, MALCOLM ROBERTS, requests rehearing or reconsideration of that portion of this Court's opinion in the above-styled cause which affirmed the judgment and sentence of appellant for the crime of conspiracy to commit grand larceny.

In support thereof, it is respectfully suggested that in affirming this portion of the sentence and judgment, based upon the pre-trial statement of appellant, this Court failed to consider the strict guidelines collated and reiterated by the Supreme Court of the United States on June, 13, 1966, in *Miranda v. Arizona*, U.S. , 16 L.Ed.2d 694, 86 S.Ct. (1966):

(1) Coercion can be mental as well as physical;

(2) Confession must be unfettered exercise of will;

(3) Confession obtained by compulsion must be excluded whatever the character of compulsion;

(4) Individual's right to choose between silence and

speech must remain unfettered throughout the interrogation process;

(5) Waiver of the right to remain silent must be demonstrated by prosecution; and

(6) Any evidence that the accused was threatened, tricked, or cajoled into waiving the privilege to remain silent establishes that accused did not voluntarily waive his privilege, and renders any confession so obtained inadmissible.

Here, there is no evidence that the confession of appellant was freely and voluntarily given. There is unrebutted evidence of a threat of physical violence preceding the confession obtained. That the threat was not accompanied by physical violence is of no import. *Miranda v. Arizona*, supra, at page 709. That appellant is an intelligent and well-informed person is of no import. *Miranda v. Arizona*, supra, at page 720. That the statement was given in a room in which there were several persons is not nearly as significant as the fact that appellant was removed to an isolated place for the explicit purpose of being threatened.

Under any or all of the constitutional safeguards surrounding the admission of a pre-trial confession recently reiterated in the *Miranda* case, there was plentiful evidence, never rebutted by the State, that "... but for the improper influences he would have remained silent....". *Miranda v. Arizona*, supra, at page 716.

More important, the long-standing rule is reaffirmed that in order for a confession to be admissible into evidence, the proof must be sufficient to establish that the making of the statement was voluntary.

It is respectfully submitted that the error committed by this Court in the instant case is fundamental to the law of confessions. Whether through inadvertence or oversight, this Court has placed the burden of proving involuntariness on an accused, rather than placing the burden on the State to prove voluntariness.

With the failure of the State to sustain its burden of establishing that appellant's confession was voluntary, when faced by unrebutted evidence of coercion, this Court erred in failing to grant a new trial for the conspiracy conviction regardless of the other evidence to support guilt.

Other than the confession, however, there did not exist sufficient, nor any, competent evidence, to connect appellant with the conspiracy.

Of all the witnesses who testified at trial, only two even knew of Malcolm Roberts before his arrest. The testimony of neither was sufficient to establish his guilt beyond a reasonable doubt as is required by the law of Florida.

Patricia Louise Yoder was the secretary and sometime girlfriend of Sherwood Rosen (R.135-136,137). She stated that she never knew Mr. Roberts before the trial (R.138). Upon inquiry as to what occurred in April of 1964, relative to the case, she responded that "there was a lot of calls from this Mel, which I later found out was Mel Roberts." (R.145) The witness was then asked whether she had any conversation with her boss, Sherwood Rosen, about these phone calls that were being exchanged between himself and this man known as Mel. She responded that he had told her these calls were *in regard to*

a loan. (R.148) At one other point in her testimony, Mrs. Yoder stated that Rosen gave "Mel" $300 "because he needed it for food for his wife and children." (R.159) Finally, she testified that she was told by Rosen that a phone number appearing on the back of a card taken from his wallet "was Mel's number." (R.195)

This is the sum total of the evidence supplied by Mrs. Yoder to connect appellant, Malcolm Roberts, with the crime of conspiracy to commit grand larceny. That such evidence falls far short of supplying substantial proof requires no elaboration.

Witness, Howard Bressler, operated a business known as the Imperial Lounge and Bar at 93 NW First Street, in Miami. (R.257) On April 16, 1964, Mr. Bressler had gone to the home of Sherwood Rosen to seek payment of a $200 loan which Bressler had previously made to Rosen (R.258). Rosen informed Bressler that somebody was going to drop money off at his place of business *in payment of the loan.* A person did come into his place of business the morning after the crime and left some money for Bressler. Bressler identified Malcolm Roberts as the person delivering the money in payment of the debt of Sherwood Rosen (R.259-260). This is the extent to which any part of Bressler's testimony involved Malcolm Roberts.

Without sufficient evidence to connect appellant with the conspiracy other than that contained in his own confession, it was error for this Court to affirm the conviction upon the conspiracy count.

(Signature and Certificate of Service Omitted)

APPENDIX C

(TITLE OMITTED)

DENIAL OF PETITION FOR REHEARING.

(Dated July 21, 1966)

Counsel for appellant having filed in this cause petition for rehearing, and same having been considered by the court which determined the cause, it is ordered that said petition be and it is hereby denied.

A TRUE COPY
ATTEST:
WILLIAM P. CARTER

Clerk District Court of
Appeal, Third District

BY LOUIS J. SPILLONE (SEAL)
Chief Deputy Clerk

cc: Joe N. Unger
James T. Carlisle
J. F. McCracken

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED TO THE CLERK OF THE CRIMINAL COURT OF RECORD FOR DADE COUNTY, FLORIDA)

APPENDIX D

Amendment XIV. — Citizenship; Privileges and Immunities; Due Process; Equal Protection; Apportionment of Representation; Disqualification of Officers; Public Debt; Enforcement

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX E

(TITLE OMITTED)

ADDITIONAL ASSIGNMENTS OF ERROR

(Dated November 19, 1965)

IN THE CRIMINAL COURT OF
RECORD IN AND FOR DADE
COUNTY, FLORIDA
CASE NO. 64-3846-A

Pursuant to the Order of the District Court of Appeal of Florida, Third District, dated November 10, 1965, De-

fendant, MALCOLM ROBERTS, herein submits additional assignments of error upon which he intends to rely in the prosecution of his appeal in the beforementioned court. These assignments of error supplement and are in addition to those assignments of error previously filed on behalf of co-defendant, LOUIS NASH, (Criminal Court of Record, Case No. 64-3621-B) which the Order of the District Court of Appeal of Florida, Third District, dated June 22, 1965, made applicable to all Appellants in Cases Nos. 65-505, 65-506, 65-507:

1. The trial court erred in admitting into evidence the pretrial statement of defendant, MALCOLM ROBERTS, made to the investigating officers on April 24, 1964.

2. The trial court erred in entering its adjudication of guilty against the defendant, MALCOLM ROBERTS, which adjudication of guilty was based in part upon the contents of a pre-trial statement made by MALCOLM ROBERTS to investigating officers on April 24, 1964.

(Signature and Certificate of Service Omitted)

APPENDIX F

(TITLE OMITTED)

ORDER OF SUPREME COURT DENYING CERTIORARI

IN THE SUPREME COURT OF FLORIDA, JANUARY TERM, A.D. 1967, TUESDAY, APRIL 11, 1967

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari, jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Florida Appellate Rule 4.5 c (6), and it appearing to the court that it is without jurisdiction, it is ordered that the Petition for Writ of Certiorari be and the same is hereby denied.

A True Copy

Test: (Seal omitted)
Sid J. White
Clerk Supreme Court.

APPENDIX G

(TITLE OMITTED)

DENIAL OF REHEARING BY SUPREME COURT

(Dated May 17, 1967)

On consideration of the petition for rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

A TRUE COPY,
TEST: (Seal omitted)

SID J. WHITE
CLERK SUPREME COURT